Supreme Court U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

FRED VAN DYKEN,

Petitioner,

v.

RICK DAY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At his second trial, Petitioner Van Dyken was convicted of deliberate homicide by virtue of a jury instruction which misdescribed the intent element of the offense – the only element contested at trial. Van Dyken's first trial jury, correctly instructed, had been unable to agree on a verdict.

On habeas review, the U.S. District Court found the defective instruction to be harmless constitutional error; it concluded the jury, if correctly instructed, would have convicted Van Dyken.

On appeal, Van Dyken contended the District Court misapplied the *Brecht* standard for assessing harmless error. He also argued that, even in light of *California v. Roy*, the methodology described by Justice Scalia in his *Carella* and *Roy* concurrences must be used to assess instructional error this distorting and fundamental.

The Ninth Circuit affirmed the denial of relief.

The questions presented are:

1. Does *In re Winship* require that the methodology set out in Justice Scalia's *Roy* concurrence be used for assessing the harmlessness of instructional errors which misdescribe the element of the offense at issue at trial?

2. In assessing the harmlessness of an erroneous elements instruction, should federal habeas courts speculate how a correctly instructed jury would have decided the case, or should they look to the role played by the actual instruction in the historical trial to determine whether it had "injurious influence" or not?

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PETITION FOR WRIT OF CERTIORARI

Fred Van Dyken respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding November 16, 1998, in order to clarify this Court's opinion and concurring opinion in *California v. Roy*, 519 U.S. 2 (1996), concerning the important federal question unsettled there and raised once more here.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is unpublished. It is reprinted as Appendix A hereto, at App. 1.

JURISDICTION

The judgment of the United States Court of Appeals was entered November 16, 1998. This petition is filed within 90 days of the entry of that order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

• The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> No state . . . shall deprive any person of life, liberty, or property without due process of law . . .

• The Sixth Amendment to the United States Constitution which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury of the state . . .

STATEMENT OF THE CASE

Fred Van Dyken, a prisoner in state custody, filed a petition for a writ of habeas corpus in the United States District Court for the District of Montana, pursuant to 28 U.S.C. Section 2254(a).

Van Dyken, serving a term of life imprisonment without possibility of parole under a 1987 state court judgment, contended that the jury instructions given at his second trial[1] for deliberate homicide misdefined the crime, thus violating his due process right not to suffer conviction except upon proof beyond a reasonable doubt of every element of the crime charged. The instructional error concerned the so-called "mental" element of the offense – the critical question whether he meant to kill or not – the only element of the offense that had been contested at either trial.

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[1] Van Dyken's first trial ended with a hung jury, with the jurors variously voting for verdicts of deliberate, mitigated, and negligent homicide – in other words, with the jurors in doubt as to intent.

The U.S. District Court found that the jury instructions given at Van Dyken's second trial did indeed misdefine the mental element of the offense, in that

> "The jury instruction actually given required only that the jury find that the petitioner intended to commit the act, without regard to what result he might have intended . . . The erroneous jury instruction as to the mental state of deliberate homicide gathers into its reach merely negligent conduct . . . "

The District Court based this analysis upon a review of recent Montana Supreme Court decisions concerning "what jury instructions are sufficient to impart the meaning of the 'purposely or knowingly' mental state . . . " [*See*, Opinion and Order dated March 11, 1997, reprinted in its entirety as Appendix B herein].

The District Court concluded the instructional error was of constitutional dimension, citing *In re Winship*, 397 U.S. 358 (1970) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). The Court then went on to conclude, however, that the error was harmless, and denied relief. This was the first finding of harmless error that had ever been made in the case.[2]

On appeal to the Ninth Circuit, Van Dyken first argued that the instructional error could not be harmless

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[2] Although the core elements instructions defining – or misdefining – intent had been a central contested issue since before his first trial, the erroneous instructions upon which Van Dyken was convicted at his second trial had not been definitively determined to be unconstitutional until after his habeas petition was filed.

even under the most lenient harmless error standard applicable. This was because it concerned a legal issue that had been central to the case since its inception; because it involved the very instruction designed to guide the jury in resolving the only contested factual issues in the trial; and because the State had specifically relied on the erroneous instruction in its summation to the jury. Van Dyken also argued that the instruction was demonstrably not harmless since the first trial jury, correctly instructed, had failed to return a guilty verdict.

Second, Van Dyken argued that even after this Court's decision in *California v. Roy*, 519 U.S. 2 (1996), it remained an open question whether a different form of harmless-error analysis was necessary in cases of instructions which misdescribed the contested elements of the offense, since such instructions effectively led to verdicts for different crimes than the ones charged. Citing Justice Scalia's and Ginsburg's concurrence to this effect in *Roy*, 519 U.S. at 6-8, Van Dyken asked the Ninth Circuit to assess whether the second trial jury ever rendered a verdict on the charged offense, not whether it would have rendered a guilty verdict, properly instructed [*See Appellant's Brief, Van Dyken v. Day*, Ninth Circuit No. 97-35550, pages 51-54, reprinted as Appendix C herein].

Without specifically addressing Van Dyken's critical second contention, the Ninth Circuit affirmed the District Court's finding of harmless error, stating it was sure "that the jury, if properly instructed, would have found that he acted 'purposely' . . . " [Opinion, p. 5, Appendix A, App. 5].

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *CALIFORNIA V. ROY* REQUIRES FURTHER CLARIFICATION IN LIGHT OF SIGNIFICANT AND TROUBLING UNCERTAINTIES REGARDING ITS PROPER APPLICATION IN HABEAS CASES.

Although it was meant to clarify harmless error analysis in the habeas context, this Court's opinion in *California v. Roy*, 519 U.S. 2 (1996) did not entirely do so. This is because the *per curiam* opinion, read together with the concurrence, still leaves it an open question how jury instructions which seriously misdescribe the essential elements of a state offense should be analyzed for harmlessness in a federal habeas context. *Peck v. U.S.*, 102 F.3d 1319, 1320-27 (2nd Cir. 1996) (C.J. Newman, concurring). As several Circuit opinions have pointed out, one could adhere fully to the lenient *Brecht/Kotteakos* standard of proof in assessing harmlessness, while still utilizing Justice Scalia's recommended methodology to determine "what *constitutes* the harmlessness to which this more deferential standard is applied," *Roy*, 519 U.S. at 6 (Scalia, concurring); *see, e.g., Peck, id.; Roy v. Gomez*, 108 F.3d 242, 243-246 (9th Cir. 1997) (C.J. Hug, dissenting); *Smith v. Horn*, 120 F.3d 400, 418-419 (3rd Cir. 1997) [applying the *Brecht* standard of proof *and* the Scalia methodology to reach the conclusion that misdescription error in state jury instruction was *not* harmless]; *Waldemer v. U.S.*, 106 F.3d 729, 736, fn.3 (7th Cir. 1996) [distinguishing between *Brecht* "standard for reviewing harmless error" and Scalia method describing "the very narrow occasion when a court's failure to submit an essential element of a criminal offense to a jury could be considered harmless"].

This uncertainty in the wake of *Roy* is magnified, as several circuit jurists have noted,[3] by the fact that the Scalia methodology appears to represent a much sounder approach to the problem of flawed elements instructions than lumping them indiscriminately together with all other "trial errors." This is because a jury instruction which seriously misdescribes an essential element of the offense has a natural and strong tendency to lead to a verdict of guilty of a different crime than the one for which the defendant was on trial. This tendency, if realized, in turn leads inevitably to the conclusion that a defendant in such a trial was denied the fundamental right to a jury verdict beyond a reasonable doubt on the offense of conviction, *Roy*, 519 U.S. at 7 (Scalia, concurring). This is much more like a structural than a trial error; it is more like the error described in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), which leaves no object upon which harmless error analysis can operate, than it is an error in the presentation of evidence. Only the supplemental harmless-error methodology outlined by Justice Scalia by way of concurrence, first in *Carella v. California*, 491 U.S. 263, 269-272 (1989), then in *Roy*, *id.*, takes account of this fact and leads to a reliable solution.

If in fact uncertainty remains as to how to determine harmless error accurately with respect to flawed elements instructions, then the possibility of gross injustice remains until the uncertainty is resolved. The present case well illustrates this possibility of injustice. Although Van Dyken argued strenuously over a period of more

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[3] *E.g.*, Chief Judge Newman, 102 F.3d at 1320-27; Chief Judge Hug, 108 F.3d at 243-246.

than four years – spanning two trials and an appeal – for an instruction faithful to the law that would focus the jury's deliberation on the critical factual issue in the case (his intent), he was ultimately convicted with an instruction that permitted the jury to return a guilty verdict without a finding of the requisite intent. Though reviewing federal judges in his habeas case accepted the State's view that the evidence against him was "overwhelming," this is a poor substitute for a verdict by twelve jurors – especially since in Van Dyken's first trial, twelve jurors, operating with an accurate elements instruction and the same "overwhelming" evidence, failed to find him guilty of the same offense.

Justice Scalia's methodology works. It leaves flawed elements instructions in the category of "trial errors" – that is, subject to harmless error analysis – while recognizing their special character as organizing and logically channeling all the jury's factual findings in the case. It recognizes that such instructions introduce a kind of error that is not really capable of being quantitatively weighed against other discrete items of evidence from the trial. Scalia is surely right that an instruction misdescribing an essential element of an offense effectively withdraws that element from the jury's consideration. It follows, as he says, that such an error "can be harmless only if the jury verdict on other points effectively embraces this one, or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well," *Roy*, 519 U.S. at 7 (Scalia, concurring). As he also says, *Brecht* simply mandates that a reviewing court, in a habeas proceeding, determine whether there is "grave doubt" that this is so; it should

not authorize it to canvass all the evidence presented in the trial to determine whether a reasonable jury would have found the absent element, had it been correctly presented – when it never was.

II. THE *ROY* DECISION HAS UNEXPECTEDLY CREATED A CONFUSING TWO-TIER "DOUBLE STANDARD" IN HARMLESS ERROR JURISPRUDENCE AS BETWEEN COLLATERAL REVIEW AND DIRECT APPEAL.

Not only has *California v. Roy* failed to create a clear and sensible rule for handling core instructional errors, it has also led to a confusing *second* "double standard" for assessing harmless error in habeas cases as opposed to direct appeals. This is because, on direct appeals, federal courts are specifically utilizing the Scalia methodology to assess whether a jury instruction misdescribing an element of the offense can be considered harmless, *see, e.g., U.S. v. Miller*, 111 F.3d 747, 752-753 (10th Cir. 1997) [explicitly using the Scalia methodology to conclude a flawed elements instruction was not harmless error]; *U.S. v. Durham*, 139 F.3d 1325, 1335 (10th Cir. 1998) [explicitly utilizing the Scalia methodology to conclude a flawed elements instruction was harmless, because "the jury verdict on other points effectively embraced" the misdescribed element]; whereas, in habeas cases, they for the most part are not, *see, e.g., Peck v. U.S.*, 106 F.3d 450, 456 (2nd Cir. 1997); *Harris v. Warden*, 152 F.3d 430, 436-37 (5th Cir. 1998) [characterizing *Roy* and other jury-instruction cases as "particularly puzzling," but not using the Scalia methodology on habeas review].

This, then, has created a twofold discrimination in the way habeas cases involving questions of harmless error are handled, in contrast to direct appeals. First – as this Court intended – the standard of proof used is different: on direct appeals, a conviction tainted with constitutional error is permitted to stand only if the reviewing court is convinced beyond a reasonable doubt that the error did not affect the result. In habeas cases, on the other hand, the conviction is sustained if the reviewing court is not left "in grave doubt" whether the error substantially or injuriously influenced the result.

Secondly, though – as this Court perhaps did not intend – in cases which specifically involve instructional errors misdefining the crime charged, a second-order difference has developed.[4] On direct appeal, the reviewing court looks to whether, upon the evidence, the jury findings that were made *necessarily* encompass findings that should have been made but were not due to the instructional error. Only if this is so as a matter of law will the verdict be sustained. In a habeas proceeding involving the same situation, however, the reviewing court looks at and weighs all the evidence presented in the case to determine whether a properly instructed jury *would have made* the missing findings – not whether they implicitly did.

In other words, in a habeas proceeding, the defendant's right to a jury verdict on the crime charged – even if conclusively shown to have been subverted – can be

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[4] A number of cases have already recognized this, *see, e.g., U.S. v. Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997); *Gilbert v. Moore*, 134 F.3d 642, 648 (4th Cir. 1998).

balanced against a reviewing court's view of the totality of the evidence presented on a cold record. This cannot happen on direct appeal. The nature of the proceeding – direct appeal or collateral review – is permitted to dictate two entirely different versions of the fundamental right to a jury trial. It seems arguable that this Court, in its brief opinion in *Roy*, did not mean to create such a complicated hierarchy of what are in essence different substantive rights for similar litigants in different stages of review. If this is so, it is appropriate that the matter be revisited now.

III. THE *BRECHT-KOTTEAKOS* STANDARD ALSO REQUIRES CLARIFICATION, SINCE, AS THIS CASE ILLUSTRATES, IT IS READILY MISAPPLIED.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court adopted a more lenient standard for assessing the harmlessness of constitutional errors noticed in federal collateral review of state criminal convictions. Such errors could be deemed harmless if the reviewing court was not "in grave doubt" about whether the error complained of influenced the verdict.

In the very cases articulating this standard, it is repeatedly said that this kind of harmless error analysis requires the reviewing court to determine whether the error probably affected the result, not whether the result would have ensued without the error. *See, Kotteakos v. U.S.*, 328 U.S. 750, 764-765, 776 (1946); *Sullivan v. Louisiana*, 508 U.S. 275, 278-279 (1993). Yet although this is said, harmless error analysis more often than not degenerates

into the creation of a hypothetical verdict. It did in this proceeding, both on the trial and appellate level. The District Court stated its final conclusion thus:

> "A review of the entire record leaves this Court with the definite conviction that Officer Kimery's death was not caused by petitioner's negligence . . . beyond any reasonable doubt, petitioner knew of the substantial likelihood that his conduct would result in Kimery's death."

The Ninth Circuit stated its conclusion thus:

> "His [Van Dyken's] testimony, when coupled with the other evidence, leaves us with no doubt that the jury, if properly instructed, would have found that he acted purposely in that he at least contemplated the same kind of harm that Kimery suffered."

Although the Court of Appeals had before it much material from the record[5] which documented the role that this critical intent instruction had played throughout two trials spanning 21 months, it chose to ignore all the historical material from which it could have analyzed the actual and probable effect of the erroneous instruction on the jury. Instead it followed the time-honored and illegitimate practice of analyzing the inculpatory evidence presented by the State at trial, and reaching its own verdict.

This Court has specifically condemned such a procedure:

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[5] This material is summarized in Appendix D hereto, which is a reprint of pages 41-51 of petitioner's brief to the Ninth Circuit.

> "To allow the error to be cured in this fashion would be to dispense with trial by jury. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the state would be sustainable on appeal."
>
> – *California v. Roy*, 519 U.S. at 7.

Sometimes, speculation seems unavoidable; it was not in this case, where a great deal of evidence from the record was available to aid in assessing the actual "effect or influence" which the erroneous instruction had on the verdict. If this Court is serious in its repeated pronouncements that harmless error analysis is more than a retrospective judicial verdict rendered on the basis of a review of trial evidence in a cold record, it must attempt to clarify the *Brecht* standard once more. It must do so by indicating clearly that actual historical events concerning judicial proceedings are compellingly relevant in evaluating the effect of identified errors on those proceedings.

This case was presented at the habeas stage in a manner which vividly articulated the difference between (1) inculpatory trial evidence; and (2) record facts pertaining to the role played by the erroneous jury instruction in the entire proceeding. It is the latter kind of fact that should be most relevant in a correctly conducted harmless error inquiry. This case is an ideal vehicle for exemplifying the distinction.

CONCLUSION

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

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